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Ostermeier, Amy A

M12.

From: Johnson, Thomas A
Sent: Thursday, October 06, 2005 2:08 PM
To: Luther, Caroline N
Subject: FW: update on first week of forced disappearances negotiations

RELEASED IN PART

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Please put this in the new folder too, if it's not in the other e-mail chain

-----Original Message-----

From: Brancato, Gilda M
Sent: Monday, September 19, 2005 7:05 PM
To: Brancato, Gilda M; Kovar, Jeffrey D; Brooks, Waldo W; Barton, Paula J; Peay, Michael T; Manning, Denise; Johnson, Thomas A; Camponovo, Christopher N (DRL); Sicade, Lynn M (DRL); Levin, Jan; DePirro, Velia M; Noyes, Julieta V (DRL); Harris, Robert K; Dorosin, Joshua L; Lucas, William E
Cc: Witten, Samuel M; Legal-L-HRR
Subject: RE: update on first week of forced disappearances negotiations

During the first week of this fifth formal session (and what will be the final negotiating session) of the working group to elaborate a binding instrument to outlaw forced disappearances, the working group essentially agreed (with dissent by Mexico) on the thorny issue of state action and treatment of comparable conduct by private actors. The formula arrived at reflects a classical view of international human rights law with which the USG agrees, and was made possible when Russia withdrew its formerly strong insistence that conduct of private actors such as that occurring in Chechnya be reached by the definition of an enforced disappearance.

The working group also discussed at length the continuing thorny issue of required disclosure of information by the State about a disappeared person and permissible exceptions to disclosure of information. The current formula allows information to be withheld to protect privacy, to prevent obstruction of a criminal investigation, and other comparable reasons based in law (which we would understand to include national security). This formula has satisfied the views of states such as Germany, China, the UK, and the US, although some GRULAC states are continuing to push for far more narrow exceptions to disclosure. This issue will be discussed again this week.

The most lively discussions to date have centered on the identity and functions of the treaty monitoring body. Despite a near 50-50 split for use of the Human Rights Committee (supported by Canada, the US, Belgium, China, Russia, Egypt, Iran, and many others) vice a new body (supported by GRULAC, Italy, France, and others), the Chair has peremptorily decided on a new body, largely for political and symbolic reasons. This issue may be discussed further but the Chair's decision has been clear from the outset and will appear in the final text.

This week the working group is doing a second and final read of the text, to be followed by discussion on any remaining issues, closing statements, and adoption of the report of the final session. Although there is no consensus in the room, and we believe that the document is far too prescriptive, and embodies the wrong position on several articles and sub-articles, it is clear that the Chair will conclude discussion this round and offer the text for adoption at the next CHR, or if no CHR, to the new Human Rights Council or perhaps directly to the UNGA.

Our final statement will reflect our view that the negotiations have lacked deliberateness and transparency and that the text contains flaws. Still, our engagement in the negotiations has contributed to much text that is consistent with important US interests:

- lack of prohibition of military tribunals
- lack of prohibition of death penalty
- an international humanitarian law savings clause
- acceptable state action formula
- deletion of provisions on pardons and amnesties
- deletion of provisions prohibiting immunities
- deletion of a "no reservations" clause,
- broad exceptions to disclosure of information,

And many others.

Developments on the second week of talks will be reported from the mission.

FYI listed below are key problematic provisions in the text.

Best, Gilda

PROPOSED INSTRUMENT ON FORCED DISAPPEARANCES

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK H PEREZ
CLASSIFICATION: UNCLASSIFIED
DATE/CASE ID: 03 JUN 2009 200601912

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United States core reservations to treaty text include the following articles.

- 1) **RIGHT TO THE TRUTH** - Preamble paragraph 7 and Article 24(2)
- 2) **DEFINITION** - Article 2
- 3) **CRIMINALIZATION** - Article 4
- 4) **CRIME AGAINST HUMANITY** - Article 5
- 5) **LACK OF DEFENSE OF SUPERIOR ORDERS** - Article 6(2)
- 6) **STATUTE OF LIMITATIONS** - Article 8
- 7) **"FOUND IN" JURISDICTION** - Article 9(2)
- 8) **NON-REFOULEMENT** - Article 16(2) & (3)
- 9) **ACCESS TO PLACES OF DETENTION** - Article 17, including 17(2) (e)
- 10) **TREATY MONITORY BODY** - Article 26 - The United States firmly supports use of an existing treaty body, the Human Rights Committee.

From: Brancato, Gilda M

Sent: Wednesday, September 14, 2005 3:58 AM

To: Brancato, Gilda M; Kovar, Jeffrey D; Brooks, Waldo W; Barton, Paula J; Peay, Michael T; Manning, Denise; Johnson, Thomas A; Camponovo, Christopher N (DRL); Sicade, Lynn M (DRL); Levin, Jan; DePirro, Velia M; Noyes, Julieta V (DRL); Harris, Robert K; Dorosin, Joshua L; Lucas, William E

Cc: Witten, Samuel M

Subject: RE: first two days of forced disappearances negotiations

In what will undoubtedly be the last negotiating session, we are addressing four open issues this week and will do a final read of the text and adoption of the final report next week. The Working Group has agreed on text for two of the four open issues: a state action formula (that reflects the international law position of the United States) and withdrawal of a treaty territory clause proposed by the Chinese. There is still much debate on the required disclosure of information by States/ right to know, and on the treaty monitoring body. These two issues will easily take up the remainder of this week. We called a meeting Monday night to urge friendly states to actively support use of an existing treaty monitoring body, and the proposal is gaining traction in the plenary discussions. However, the Chair and GRULAC are vehemently opposed, and the current head count is evenly balanced between support for a new vice existing treaty body. Will report further after discussions develop this week.

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Sincerely, Gilda

-----Original Message-----

From: Brancato, Gilda M
Sent: Friday, September 09, 2005 10:02 PM
To: Brancato, Gilda M; Kovar, Jeffrey D; Brooks, Waldo W; Barton, Paula J; Peay, Michael T; Manning, Denise; Johnson, Thomas A; Camponovo, Christopher N (DRL); Sicade, Lynn M (DRL); Levin, Jan; DePirro, Velia M; Noyes, Julieta V (DRL); Harris, Robert K; Dorosin, Joshua L; Lucas, William E
Cc: Witten, Samuel M
Subject: RE: USG changes to forced disappearances text

Please replace the earlier red-lined text circulated Wednesday night with the revised version attached, which reflects additional comments received as well as my discussion with IO/SHA Tom Johnson on acceptable and unacceptable provisions in Article 26 on the treaty monitoring body. Please let me know if you have any questions or comments.

Best regards, Gilda << File: LEGAL-#15026-v1-Core_USG_changes_disappearances_text.DOC >>

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